EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES and EXCHANGE COMMISSION,

Plaintiff,

v. 20 Civ. 10832 (AT)(SN)
Remote Proceeding

RIPPLE LABS, INC., et al.,

Defendants.

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New York, N.Y.
April 6, 2021
2:00 p.m.

Before:

HON. SARAH NETBURN,

U.S. Magistrate Judge

APPEARANCES

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon, everybody. This is Judge Netburn. Let's begin by calling the case and then I want to address a few housekeeping matters before we address the motion that's before me today.

This case is SEC v. Ripple Labs Incorporated, the docket no. is 20 Civil 13832. Let me first confirm that our court reporter is on the line.

OFFICIAL REPORTER: Good afternoon, your Honor. Pamela Utter with Southern District Reporters.

THE COURT: Wonderful. Thank you.

On behalf of the SEC?

MR. BLISS: Good afternoon, your Honor. This is Dugan Bliss. Joining me are my colleagues, Jorge Tenreiro, Daphna Waxman, Jon Daniels, and Ladan Stewart.

THE COURT: Thank you. And will you be speaking primarily on behalf of the SEC?

MR. BLISS: I will, your Honor.

THE COURT: Thank you.

And on behalf of defendant Ripple Labs?

MR. KELLOGG: Good afternoon, your Honor. This is Michael Kellogg. With me on the phone are several colleagues, but I will be the one speaking on behalf of Ripple Labs.

THE COURT: Thank you.

On behalf of defendant Bradley Garlinghouse?

MR. SOLOMON: Good afternoon, your Honor. Matt Solomon from Cleary Gottlieb and, like Mr. Kellogg, there is other Cleary lawyers on the phone but I will be speaking on behalf of Mr. Garlinghouse today. Thank you.

THE COURT: Thank you.

On behalf of defendant Christian Larsen?

MR. FLUMENBAUM: Good afternoon, your Honor. This is Martin Flumenbaum from Paul Weiss. With me are my colleagues, Mike Gertzman and Meredith Dearborn, and Mr. Gertzman will be the principal spokesperson for this hearing for Mr. Larsen.

MR. GERTZMAN: Good afternoon, your Honor. This is Michael Gertzman.

THE COURT: Thank you. All right. Good afternoon.

I hope everybody on the call is healthy and safe, as well as our audience listening in. Let me first address the audience. I understand that we have 500 people listening in. I understand that we have maxed out our capacity to have people listening to the conference. We apologize for that. We will see if we can make arrangements to increase the limit from 500 but that is the full capacity for today's conference. Related to that, earlier this morning I was conducting other business and approximately 175 individuals called in this morning -- into my conference line that I ordinarily use for court conferences -- thinking that our 2:00 p.m. conference was scheduled for this morning. And that lasted for several hours

constantly interrupting my other cases. I then issued an emergency order which I think stemmed that flow of people calling in during my other court conferences. We will make every effort to keep these conferences open to the public. We have every intention of accommodating as many people as we can and doing everything that we can to facilitate an open hearing as though we were in the court house but I do need everybody who wants to participate to pay attention to when conferences are held. This is not my only case and having 175 people calling in, interrupting my court conferences, was incredibly disruptive this morning, and so I will request and urge that anyone who wants to listen in is welcome to listen in but please make sure that you are calling in at the right time. I know a number of you were calling in from abroad and so maybe there was some confusion as to how to calculate the time. Please, use the Internet or some way to make sure you are calling at the right time that the conference is scheduled for so that that problem that happened this morning, which as I said, was incredibly disruptive to my morning conferences, does not repeat itself.

The second housekeeping matter I want to raise is with respect to recording or rebroadcasting of today's proceeding. That is strictly prohibited. Let me say that again. It is prohibited for anyone to record or rebroadcast today's proceeding. That has been the law in the Southern District of

New York for as long as the court has been around and it is the oldest court house in the country. We have a court reporter here, she is excellent, and she is transcribing every single utterance and that record will be made available to the public through the court's filing system but it is impermissible to record the conference and post it on YouTube or any other platform for the public to see. That is a violation of our court rules and it is a violation of my order directing everybody not to record or rebroadcast today's proceeding.

So, I want to make those points as clear as possible so that we don't find out, as we did after our last conference that the conference was recorded and then it was broadcast onto YouTube.

Okay. With those housekeeping matters completed let's turn to the reason that we are all here today which is the application filed by the defendants and a letter filed on March 15 regarding discovery requests that were served on the SEC. I have received the defendant's letter, again filed March 15th, the SEC's response filed on March 22nd, and the defendant's reply which was filed on March 24th and I have reviewed all of those in preparation for today's proceeding.

Why don't I turn first to the SEC, even though this is defendant's motion, but since the defendants filed a reply brief I would like to turn first to the SEC so I guess I will address my questions to Mr. Bliss.

Mr. Bliss, let me ask you a few questions. I understand that a number of the arguments that you raise in opposing the discovery that is sought is by citing other cases that address two different factors, one is the question of whether or not other cryptocurrencies, namely BitCoin and Ether whether discovery related to those assets could be discoverable in cases here and you cite to a couple of cases including the *Kik* case where Courts have held that discovery related to other assets was not appropriate. So, I would like to ask you whether or not in any of those cases you had individual defendants that were sued where questions about recklessness or knowledge was at issue, or whether all of those cases that you cite were cases brought exclusively against the alleged issuer.

MR. BLISS: Yes, your Honor. So, those were cases brought against issuers, not against individuals, although I do believe that we explained in our letters why we think the reasoning applies.

THE COURT: Let's talk about that a little bit. Go ahead.

MR. BLISS: So, I am happy to expand. So, defendants asked for these documents because essentially they're asking that the Court look at how XRP was viewed and somehow it would be relevant to look at how Bitcoin and Ether are viewed as well. Defendants summarily claim that Bitcoin and Ether are like XRP but that is simply wrong and defendants know better

than anyone how XRP is different from those digital assets, and I think, your Honor, if you look at that and just on the facts as we have alleged them, it is clear why the arguments are making -- don't make sense. So, among other things, we alleged in our complaint at paragraph 53 that back in 2012, Ripple and Mr. Larsen received legal memos stating that XRP could be considered a security including because Ripple was responsible for promoting and marketing XRP and --

THE COURT: Can I stop you for one moment?

MR. BLISS: Yes.

THE COURT: Sorry, Mr. Bliss.

I just want to remind you that we are on an open and public line and to the extent there was any information that was filed under seal, I don't know if what you are talking about covers that, but I just want to remind everybody that there were documents that were filed under seal here and that should be honored.

MR. BLISS: Absolutely, your Honor. And to be clear, I am only going to reference facts that we alleged in the complaint, although there were additional facts filed under seal that I will not be mentioning during this argument.

THE COURT: Thank you. All right. Proceed.

MR. BLISS: Certainly.

So, additionally, all 100 million XRP in existence were created in 2012 and were controlled by Ripple and its

founders as we allege at Complaint paragraph 46. Now, in contrast, Bitcoin and Ether are mined on an ongoing basis, meaning that totally unrelated people from around the world performed calculations with computers that unlock new coins which those people can then hold or sell themselves. And unlike Bitcoin and Ether, Ripple and Mr. Larsen, and later Mr. Garlinghouse, themselves offered and sold XRP all from that 100 million XRP that was originally created that was part of an ongoing offering that continued from at least 2013 to the filing of the complaint and raised about $1.4 billion for Ripple and enriched Mr. Larsen and Mr. Garlinghouse by about $600 million as we allege in paragraph complaints paragraphs 1 through 8.

So, the point is there was never a central promoter profiting from an ongoing offering of Bitcoin or Ether. So, XRP is nothing like those other digital assets. And so, however defendants try to explain the basis of the relevance of the Bitcoin and Ether documents, we just believe there is no supporting basis. We did, obviously, highlight several cases that did not analyze or, rather, did not analyze Bitcoin and Ether, Zaslavskiy, Telegram, Kik as you noted. I do agree that those did not involve individual defendants but there is nothing about the inclusion of individual defendants in our case that somehow makes these coins that are not at issue in our case relevant to the proceedings here.

THE COURT: Can I ask you a question, Mr. Bliss? If you are saying to me, Judge, they shouldn't get documents related to Bitcoin and Ether because those are just totally different assets, they have nothing to do with XRP; if I am to make a discovery ruling on that conclusion, wouldn't I just be deciding the case? Because as I understand it the defendants are saying, well, actually, there are many ways in which they are similar and we are at discovery and we are entitled to pursue our own defenses and one of the defenses that we are going to make -- maybe we will be successful and maybe we won't -- but one of the defenses is, hey, we are just like those guys and so we want to build-up that defense.

So, it seems to me, if I understand your argument, that if I were to agree with you and say you are right, these are different assets and they shouldn't get discovery I would basically be deciding the case.

MR. BLISS: Your Honor, I understand where you are coming from but in response, no. For instance, defendants own cited case law I think really establishes that. Because the case law that is out there, such as the *Marine Bank* Supreme Court case, says that in doing the analysis that the Court will ultimately have to do in this case that the Court has to look at the character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospects. That's the Supreme

Court's *Marine Bank* decision. In other words, the focus is on the promoter. In Section 5 cases, be they, you know, crypto, digital asset cases, or otherwise, the question is how did the promoter offer this instrument? Was it offered as an investment? Was it something else? There is absolutely no case law supporting the idea that pulling in some unrelated asset that somehow adds to the analysis matters and so, no, there wouldn't be pre-judgment of the case because the case, from the outset, needs to be focused on XRP, not on these other assets that have nothing to do with whether XRP is a security.

THE COURT: That brings me to another question that I was going to ask you which is is it your view that the *Howey* factors, when the Court is evaluating those, that the Court should be looking exclusively at -- from the point of view of the alleged issuer, meaning all that really matters, all that should be concerned is how XRP or Ripple Labs introduced itself to the world, how it made its offers -- I'm not using that word in the legal term -- but how it promoted and presented itself and that the Courts would not be looking at the marketplace, the community, and how what was being offered for sale was being interpreted by the rest of the community.

MR. BLISS: Well, I think, your Honor, that several cases have dealt with this including the *Warfield* case out of the Ninth Circuit which found that it's possible that some factors, in terms of market understanding of third-parties are

relevant, but the *Warfield* case found, did "we must focus our inquiry on what the purchases were offered, were promised." And so, there are certainly are factors about market understanding that are relevant but case after case -- *Marine bank*, *Warfield*, and others that we discuss -- keep going back to the offer and the promise made by the promoter. So, the case is focused from a legal perspective and should be focused from a discovery perspective on that. To broaden it and to bring in these unrelated coins, it simply goes far beyond what the law provides and how to decide these Section 5 cases.

THE COURT: Thank you.

So, we were talking a moment ago about individual liability and you were, I believe, expressing the view that the claims against Garlinghouse and Larsen don't change the analysis from any of these other cases that have been relying on.

Can you discuss with me more a little bit why that is your thinking?

MR. BLISS: Sure.

So, I think that's one of the reasons why the defendants assert that it somehow does change, it relates to the claimed lack of due process or fair notice that they claim to have not been given but, as we cited, and in particular the *Kik* case focuses on that issue. It makes clear that the law does not require the government to reach out and warn all

potential violators on individual or industry level and I think, more importantly for today's purposes, the Court in *Kik* ruled that the vagueness inquiry does not call for a factual investigation, and to whether the statute has led to arbitrary enforcement it asks objectively whether the statute authorizes or even encourages arbitrary and discriminatory enforcement. So, whether it is based on the individual's scienter, affirmative defenses, or standard liability under Section 5, we are talking about objective facts that matter. The *Howey* test raises objective questions based on the facts known to defendants. The due process and fair notice defenses raise objective questions about the statute and so none of these various issues that have been raised by the defendants or, in particular, the individual defendants, provide any basis to expand discovery into assets that are not at issue in the case and, as we point out in our letter, we certainly don't believe that they have identified a single case that has done that or that would support doing that.

THE COURT: Thank you.

Let's change focus now. Can you talk about, more generally, setting aside the Bitcoin and Ether documents but even with respect to the XRP documents, the SEC's position with respect to searching communications with third-parties, other government agencies, and searching more broadly even within the SEC. I understand that that has been only to look at its

investigative files and only half of the custodians that were sought. So, can you talk to me about the SEC's position with respect to what I will call the XRP documents?

MR. BLISS: Yes, I am happy to do that, your Honor.

Fist of all, we did agree, as part of this meet and confer process leading up to the March 15 letter, that we would review the e-mails of nine custodians who are high-ranking SEC individuals for the terms "XRP" and "Ripple" that occurred in external e-mails, meaning any communication that went outside of the SEC itself so it could be to a complete third-party, to another government agency, something like that, that we would review those and produce responsive non-protected non-privileged documents to defendants. So, we are in the process of doing that. In terms of going beyond that -- so obviously I have explained in some detail, both in the letter and today, why we don't think that Bitcoin and Ether are relevant and so why we didn't agree to search beyond that. There are two additional parts to your question, one is the searching for the internal XRP and Ripple documents and, finally, I will get to the custodians themselves.

As for the internal XRP and Ripple documents, our view, in coming up with this offer during the meet and confer process, was that even though we don't believe that any of these communications, you know, with third-parties between SEC individuals and the outside world about XRP, are of any

relevance. Nonetheless, to try to accommodate defendants' theory that somehow that would reflect the market view of XRP, we did agree to produce those documents that are non-protected because there would be third-party communications that would presumptively not be protected. But when it comes to --

THE COURT: Can I interrupt you for definitional clarification?

MR. BLISS: Yes.

THE COURT: You are talking about internal communications, and when I think of internal communications I think of SEC staffer to SEC staffer as an internal communication but it sounds like you are referring to a communication from an SEC staffer to somebody outside the SEC. So, I just want to be clear what I am talking about.

MR. BLISS: I apologize, your Honor. I clearly was confusing the way I said it. I am referring to the internal communication being e-mail communications between SEC staffers or potentially commissioners, but essentially e-mail from one SEC.gov address to another. If there is an outside e-mail address involved I would characterize that as an external communication.

THE COURT: So now we are just talking about internal SEC to SEC.

MR. BLISS: Yes.

And so, the internal communications really fall into

two buckets; one is that the defendants have asked for internal communications that reference external communications. We think that it would be unnecessarily burdensome and duplicative to conduct that review because we are already going to be producing the external communications themselves and so it would be a lot of review to simply produce information related to what we are already producing. Now, the other set of documents would be the internal discussions that if two folks from one the SEC were, for whatever reason, discussing XRP or Ripple. Now, we believe that those are completely irrelevant because there was no communication of those views to the outside world to influence the market view as defendants are looking for, and so there is simply nothing of relevance. In addition, as we pointed out in our letters, when you are talking about internal agency communications you are getting to the heart of deliberative process and other privileges and while we have not reviewed all of those documents and while I can't say for certain that any particular document would be covered by the deliberative process privilege, law enforcement, attorney-client, or work product, we also believe that a substantial chunk of any review like that would be of protected e-mails and so it would be asking us to search for irrelevant and protected e-mails which we just feel that it is a disproportionate burden in the case.

Finally, your Honor, if you would like, I am happy to

go into a little bit more detail about how we selected the nine custodians out of the 19 suggested by defendants. If your Honor wants to do that I would suggest that I will do that by referring to initials rather than names given the nature of these proceedings, if that's acceptable.

THE COURT: That is certainly acceptable to me. I am happy to hear from you on your views generally.

MR. BLISS: Yes, your Honor.

So, as to the custodians, we first of all identified a number of custodians on our own before the custodians were suggested by defendants. They then provided a list and there was a substantial overlap between the ones that we already picked and the ones that they wanted. And so, what we did is that we had internal discussions to identify which individuals in which division or other part of the Securities and Exchange Commission would have potentially had communications with third-parties -- with the outside world -- about Ripple or XRP. And so, we identified two or three of the most relevant and highest ranking people within the divisions of trading and markets, divisions of investment management within the division of corporate finance, as well as FinHub which is a subpart of CorpFin dealing specifically with digital technology. And so, based on that we believed that we had identified the most relevant custodians. We cross-referenced that with the initial disclosures put forward by defendants to make sure that if they

had identified any individuals from the SEC they were included on that list and we did that. And so, that is how we arrived at the nine individuals that we are currently searching for e-mails in their boxes and those would be initials EB, DB, WH, JI, JM, BR, VS, AS, and MV.

Now, there are 10 additional custodians that were suggested by defendants who we don't believe -- we have not agreed to search the e-mails and we do not believe we should be ordered to search the e-mails and so there are a few reasons particular to different individuals. So, as to the individuals with the initials FA, KL, and JB, these are people who are in or were in high-ranking positions within the division of enforcement who either were involved in the investigation leading to, or who in the case of JB we have no reason to think that there were third-party communications about XRP or Ripple. So, for the other two, we think that's -- and the review would show documents related to the investigation, not the type of third-party communications that we understand defendants to be seeking.

There are a few custodians who we believe are simply duplicative of others and so those would be with the initials SGB, RC, MR, and NS, who are largely are or were in the division of corporate finance or the cyber unit. And, from our understanding of how communications are made within those divisions involving those people, we believe that searching

those e-mails would largely produce duplicative results. In other words, if those people were involved with communications with the outside world, based on our own internal diligence, we believe those communications would nevertheless show up in the mail boxes of those custodians we are already searching.

And then, finally, there are three additional custodians suggested by defendants with the initials JC, HP, and ER, and those individuals are either current or former SEC commissioners or chairs and our understanding is that those individuals would have been unlikely or less likely to have communicated with the outside world about XRP or Ripple by e-mail but that has not been the standard practice. And so, we did not agree to search those mail boxes on that basis. And I apologize, that's a bit of a lengthy explanation, but that was our analysis of each of the proposed custodians.

THE COURT: No, that was helpful. Thank you very much.

Let me turn to Mr. Kellogg who I assume is going to take the lead here.

MR. KELLOGG: Thank you, your Honor.

I think Mr. Bliss' discussion really highlights why we need and why we are entitled to the information about Bitcoin and Ether. At issue in this case is almost how to apply a 90-year-old statute and 75-year-old Supreme Court precedent to something that only came into existence quite recently which is

cryptocurrencies. The SEC has not provided a lot of guidance on that issue and they have been widely criticized for not doing so but we do have some data points to look at. On the one hand there is the well publicized conclusion that two digital currencies -- Bitcoin and Ether -- do not run afoul of the how we test and are not securities. On the other side of the spectrum they have their initial coin offering cases, you will see reference to DOW tokens, and you mentioned Kik and Telegram, and they have said that those are securities because an initial coin offering is just like a fundraising tool created to start creating and deploy future crypto. So, in that context, digital coins or tokens are really shares in the enterprise that will be created when funds are raised. The question here, at the great risk of oversimplifying an important issue, is whether XRP is in relevant respects like Bitcoin and Ether, or whether it is like the tokens in the other digital asset cases the SEC relies on. So, understandably we are seeking documents exchanged between the SEC and third-parties about Bitcoin and Ether and why they are not securities so that we can apply that to our own XRP.

Now, the SEC claims we are not entitled to those documents because Bitcoin and Ether are "unrelated digital assets" and therefore irrelevant to the *Howey* test. Instead, they claim that XRP is indistinguishable from the DOW tokens and the initial coin offerings but that is a classic legal

argument based on precedent. Is the unique instrument we are dealing with today, is it more like precedent A or is more like precedent B? And perhaps the most telling fact on that motion is that the SEC, itself, is seeking comparative information about XRP and other digital assets. It made clear just last week, as part of the meet and confer process -- and I want to quote this because it is quite remarkable given the argument he is making here -- they said to Ripple, "We request that you also search for and produce documents relating to comparisons to assets that have been the subject of SEC enforcement action for being securities under *Howey*." In other words, they want to see comparative information of how XRP relates to other digital assets but only if they think it helps their case. If it helps our case then they argue that the assets are unrelated and information about them should be excluded. Now, that's not the way Rule 26 works. The question is whether requested discovery is relevant to any party's claim or defense. And as the Court explained in *Palm Bay International* and as you yourself noted earlier, and I quote here from the case: It would be inappropriate for the Court, at this discovery stage in this litigation, to make any substantive determination regarding a disputed defense. That determination is properly made upon a motion for summary judgment or a trial before the district judge.

So the SEC, in essence, wants summary judgment on this

aspect of our defense but they don't get it in a Rule 26 dispute; all we need to show is the relevance of it to any defense that we might offer. Now, I am happy to walk through the merits on why we think that Bitcoin and Ether are in fact like XRP, they are the three major digital currencies in use today and I can go down a check list of factors that they share in common. Indeed, I can also add factors that show that XRP has certain advantages over Bitcoin and Ether that makes it even less like a security in the SEC's telling and under the *Howey* test. Again, though, that isn't relevant, the merits right now. What is relevant is that we have got a legitimate defense that we think we should be able to press. The SEC has published a 38-factor test for when a particular coin or cryptocurrency is a security or at least factors that they say you should take into account but they have made no effort to weight those factors in any way or provide actual guidance for the marketplace so we are left in the position of saying, okay, these two -- Ether and Bitcoin -- you have said that they're not securities. These over here -- DOW, Telegram, Kik -- they are securities. We can gather evidence to support our view of why XRP is like Bitcoin and XRP, part of which will show under the *Howey* test that the Price of XRP moves in conjunction with the digital currencies Bitcoin and Ether, not with anything that Ripple is doing to promote those which is extremely relevant under the *Howey* test. The SEC is incorrect that *Howey*

somehow silos XRP and treats it in isolation as if Bitcoin and Ether did not exist. That's not the way the *Howey* test works. As the case law indicates and, actually, as the SEC itself concedes, whether XRP is a security is a fact-specific inquiry that necessarily turns on the totality of the circumstances. So, we need to investigate the circumstances under which Bitcoin and Ether are not securities, as well as the circumstances under which that the SEC wants to indicate what in DOW and Kik are. The case Law says *Howey* turns on the character of the instrument in commerce and what objective participants were led to expect, and XRP's character in commerce, what people were led to expect, is shaped by the SEC's own messaging to the public about Bitcoin and Ether, similarities between those currencies and XRP and its eight years of non-action against XRP. All of that led market participants and Ripple itself to conclude that XRP was not a security. But, definitely relevant to the *Howey* test, as you pointed out, it has great relevance both to our fair notice defense because if we -- and the Second Circuit put it in *Upton* -- if the SEC failed to give, "a person of ordinary intelligence" a reasonable opportunity to know what is prohibited and they are not put on fair notice that the SEC would suddenly, after eight years decides that it would treat XRP as a security and the same as Mr. Solomon and Mr. Gertzman will elaborate, the same applies whether the individual

defendants were reckless or had knowledge that XRP would be found to be a security.

Now, we have already found documents from third-parties going to various market participants like cryptocurrency exchanges and hedge funds, met with the SEC specifically seeking guidance on whether they could list and transact in XRP along with Bitcoin and Ether or whether XRP had to be treated as a security. They presented their own analysis to the SEC about why XRP was not a security. And after the meeting they proceeded to list XRP on their exchanges or invest in XRP in their funds. So, obviously they reached the conclusion that XRP was not a security and was not told otherwise by the SEC. So, materials on those meetings between the SEC and third-parties were shaping market expectations about XRP and are highly relevant to our argument that we are like Bitcoin and Ether and not like the initial coin offerings at issue in Telegram. And the SEC obviously cannot dispute that its communications with these third-parties about how XRP compares with Bitcoin and Ether and are not securities are plainly relevant to our defenses and Rule 26 requires no more.

If I may move on I will turn to the SEC internal documents and we are talking about documents concerning XRP itself, as well as documents about how XRP compares to Bitcoin and Ether and why the latter aren't securities.

THE COURT: Mr. Kellogg, I just want to raise the same

definitional points that I raised with Mr. Bliss which is if you can be clear about whether you are speaking about documents within the SEC, meaning SEC staffer to SEC staffer at whatever hierarchy, versus documents between someone at the SEC and someone outside of the SEC, whether that's another government agency or a market participant or whomever.

MR. KELLOGG: Yes, your Honor. I am now talking about the former, purely internal SEC documents, but one of the reasons why such documents are relevant is that to the extent that they're reflecting their communications in meetings with third-party, they'll reveal market views on XRP and additional contacts that external communications alone would not show. The internal communications don't have themselves to be admissible to be discoverable under 26(b)(1). Now, as I noted, the SEC is the focal point for requests for regulatory guidance as to whether XRP was a security. There are more than 200 currency exchanges (inaudible) creating an XRP before the suit was brought and at least as many companies after using XRP in their business plans. We can't track down every one of those companies to find out their interactions with the SEC but the SEC's own internal correspondence, summaries of meetings, communications, reports of communications the SEC may have had with market participants, e-mails about meetings just concluded, arguments made by participants in those meetings, those will all provide us with a shortcut to clearly admissible

evidence about third-party views.

The second point here is it is part of the SEC's mission statement to study and understand market conditions. There almost certainly are documents in their files that reflect not SEC deliberations but market conditions and investor expectations regarding digital currencies studied by the SEC and that evidence goes squarely to the *Howey* inquiry. As the Second Circuit held in the *Glen-Arden* case, to properly apply *Howey* the Court must consider what investors contemplated, their understanding of what defendants would do to turn a profit, and market condition. Those are market facts and no one is in a better position to have studied those market facts than the SEC. And to stress we are not talking about deliberations, we are not talking about what led to their final enforcement decision, we are talking about their gathering reports and otherwise on-market facts.

And the third reason why the internal communications are important is they're likely to show that the SEC was flailing when it came to the application of the Securities Act of 1933 in digital currencies. It is understandable that they want to keep such documents hidden but they chose to bring this case and such documents would support the individual defendants' lack of knowledge or recklessness and Ripple's lack of fair notice. It will also reflect the SEC's own knowledge about market uncertainty and how the SEC chose to respond or

not to respond to that uncertainty. Let me just give one example: We have a copy of a communication that the SEC has made about XRP to the public saying that after a request was received on whether XRP is like Bitcoin and Ether or not in which the SEC -- this was just two months before they filed the suit -- we haven't made any decision about XRP, we are not in a position to say anything about XRP. But their internal communications on that issue are likely to reveal deficiently substantial uncertainty that no market participant could have been on fair notice as to how the SEC would come out in that case.

Finally, if I may, I will address burden and privilege. Mr. Bliss did not press burden particularly much and for good reason. The burden of complying with our request is far less than complying with the SEC's own request. We have the statistics laid out at page 5 in our reply. What we are requesting is also proportional to the needs of the case considering the importance of the issues at stake, the amount in controversy, and the parties' relative access to information, all of which are factors are relevant under 26(b)(1). And that's also true of custodians. We sought documents from 19 custodians compared to the 30 custodians the SEC sought from us. All 19 were centrally involved in meetings with market participants and understanding the character of digital currencies and commerce. And, if they were following

government protocols, all of their communications would be over the SEC.gov handle and, hence, readily searchable. The SEC unilaterally cut down our list to nine custodians and as we are holding information from the other 10 if we just ask, if not more likely, to have responsive documents. They picked our 30 custodians, we didn't get to pick and choose. They don't get to pick and choose anymore who the custodians we want them to search are, as long as it is proportional to the importance of the case an the needs of the parties. And I am happy to go through all of the examples. I think one of them is particularly important, I am only talking about publicly available information so there is no invasion of privacy here but the Commission's former chairman is the one who authorized the suit against XRP on his last day in office, thereby causing a huge and immediate drop in XRP's market value, yet Mr. Clayton has actively embraced Bitcoin and Ether. Indeed, he was the face of the agency meeting constantly with market participants and receiving studies on the features and roles of each of those digital currencies in commerce. He was even writing to Congress about them. Based on these meetings and studies, he obviously concluded that XRP is a security but Bitcoin and Ether are not. That has enormous market consequences and we should have the right to seek documents and meeting memos as set forth to the critical features and market perceptions of each of the three digital currencies.

Now, as to privilege, communications with third-parties about Bitcoin and Ether are obviously not privileged, just to go back to the first step in the discussion. None of those things are privileged. Nor should internal documents be to the extent that they're about market conditions. Case law draws a clear distinction between factual material and deliberative process. Moreover, the fact that some documents may be privileged is not a basis to refuse to conduct search. Even some documents that are privileged, whether it's deliberative process, litigation privilege, they're subject only to a qualified privilege which means that we may be entitled to argue as to specific documents if we have a compelling need for them and no other source to fill that need. But, we can develop those arguments only if the SEC does what Rule 26 requires which is review the documents and prepare a privilege log.

Those are the points I wanted to make, your Honor, and I am happy to answer any questions.

THE COURT: Let me ask you a question with respect to the documents related solely to Ether or Bitcoin.

My understanding is that in 2018 the SEC announced its decision that those two assets were not securities. Is there any reason why you would need or be entitled to communications in any form that relate solely to Bitcoin and Ether that post-date that decision?

MR. KELLOGG: First of all, ones that post-date a decision are not subject to the deliberative process whatsoever, they're considered the development of the law by the SEC and so there is no privilege for such document to the extent that they reflect the SEC's understanding of just why -- an elaboration of just why Bitcoin and Ether are not securities. Now they announced this to the public -- or rather the director of their corporate finance division announced this to public in a speech in 2018 but it will read that speech in vein for any details about just what it is that makes Bitcoin and Ether not a security where it is something like a digital currency like XRP is a security. They talk about, for example -- I mean we can go over the assets. They say it has a --

THE COURT: I will stop you. Sorry. I will stop you.

MR. KELLOGG: Okay.

THE COURT: I don't need to go over the assets but my question is if one of the reasons why you want to look at Bitcoin and Ether communications or documents, I believe exclusively to those assets, is because you want to see what the SEC was thinking, what it was saying to other market participants about how it was viewing these assets. But, we know that come 2018, when the speech is given, we know what they think because now they're going public with it whether in a sort of speech or otherwise, and presume that that decision

was well thought out before the speech was given. And so my question to you is, after that public announcement in whatever fashion and in whatever opaque way it was made, after that announcement why would it matter what they were saying about those assets since the market now had that information and would act accordingly?

MR. KELLOGG: Because the reasons for the decision are certainly less than clear. As I said, they later came up with the framework for investment contract analysis, the list of 38 factors with no explication. So, the reason why subsequent communications, you could say everybody was coming to us and saying, Okay, you now told us that Bitcoin and Ether are not securities, you told us that DOW tokens are securities, what about the vast middle in here? What about XRP? In what ways is that like Bitcoin and Ether? In what ways to you think that is like DOW tokens? And that information, what it is telling the marketplace, is an admission about what the key factors are that the SEC would apply to say something is or is not a digital security as opposed to a cryptocurrency. And we think that to the extent they have articulated some factors elaborating on the *Howey* test, we think we fall within what they were telling people about when a particular currency is or is not a digital asset. That's been an ongoing dialogue since the speech in June of 2018 that was given by Mr. Hinman.

THE COURT: Thank you.

I want to give an opportunity to the individual defendants to speak but I want to reiterate my admonition to the public again that the recording of today's conference is prohibited and rebroadcasting it is prohibited and that anyone who is found to have engaged in this conduct is subject to criminal sanctions. I know that this is being broadcast now on the Internet and so we already have people looking into who is engaging in that conduct. Again, we will make this proceeding as open as possible, to make it available for more people to listen in than the 500 that are already listening if we are able to do that. Obviously, if we were in the court house we would be limited by the physical limitations of the court house. The fact that we are engaging in this proceeding remotely is not a basis to engage in criminal violations and so we have our law enforcement officers looking into this issue now. And so, whoever is engaging in this conduct is on notice that they are engaging in a violation of my specific order to stop doing it, as well as the rules of our court and that whoever is engaged in this conduct may be subject to criminal sanctions.

So, why don't I turn -- I think we have spoken a lot about some of the issues that relate to the individual defendants but if Mr. Solomon or Mr. Gertzman wish to be heard, I will certainly give them an opportunity to speak.

MR. SOLOMON: Thank you, your Honor. Matt Solomon for

Mr. Garlinghouse and I am cutting as we are talking so I am really going to trying not to repeat Mr. Kellogg's points which were ably made with respect to *Howey* and, independently, with respect to the individuals but let me amplify on the individuals to make crystal clear our position.

As your Honor knows, in order to establish aiding and abetting, and that's the second charge here brought against the individuals, the SEC has to prove that Mr. Garlinghouse and Mr. Larsen acted with scienter and that means that, to take my client, Mr. Garlinghouse knew or recklessly disregarded that he was associating himself with something improper, and that something improper in the SEC's telling is Ripple's offers and sales of XRP without a registration statement. And that, your Honor makes this a very different case from the typical SEC case. As you asked Mr. Bliss about up front, because aiding and abetting charges are involving lying, insider trading, accounting fraud, here the SEC case is really one of regulatory interpretation and I think that's really what separates it from so many others. And the SEC isn't just saying that Mr. Garlinghouse and Mr. Larsen got it wrong, they're saying they got it beyond grossly negligent wrong, they were reckless in not knowing that XRP was a security or they intentionally avoided knowing that XRP was a security. So, why is that relevant for today's purposes? We have already talked about the kind of documents we are seeking, your Honor, documents

perhaps showing that the SEC itself was struggling with the question of whether XRP was a security and documents showing the SEC's communications with other market participants who were trying to get insight from the regulator as to whether XRP was a security. And where the SEC is advancing as its primary theory that Mr. Garlinghouse and Mr. Larsen acted recklessly or consciously avoided knowledge that they were acting improperly because the SEC sales formed investment contracts and substantially assisted that violation, again, what they have to prove is in the face of an unjustifiably high risk of harm that is either known or so obvious it should be known that they are liable as aiders and abettors. So, we are not talking about negligence, we are not talking about gross negligence, this is an order of magnitude above that, that's the scienter component. And the key to the scienter component in terms of the discovery that's being sought in this case, your Honor, is that recklessness has an objective component and that's the Supreme Court that says that and the *Safebuilt* case that we cited, and the Second Circuit affirms that in the *Sleighton* case, 604 F.3d at 776, note 9, and it is that objective component that is most relevant here. The SEC's understanding of and discussions around the nature of XRP throughout the entire time, as well as Bitcoin and Ether which apparently are not securities according to the SEC is relevant to the question of whether the allegedly improper aspects of Ripple sales were

so obvious that they should have been known by Mr. Garlinghouse and Mr. Larsen. And just to be very concrete about it, your Honor, let's say we learn through this discovery that it wasn't so obvious to Jay Clayton, or it wasn't so obvious to Bill Hinman who ran CorpFin that XRP was or is a security, if we get that and we are entitled to look for it before a fact finder, that's game over for the SEC under the aiding and abetting claim. And, frankly, their entire case. That's just one illustration of why this discovery is so critical.

Conscious avoidance is another theory that the SEC has put out in addition to recklessness. That requires that the SEC prove the executives deliberately shielded themselves from sheer evidence of critical facts that are strongly suggested by the circumstances. This is the *Global Tech Appliance* case. And again, we are going to show in our motion to dismiss which will be filed next week, that the SEC has not adequately alleged knowledge and recklessness and we believe that Judge Torres will ultimately dismiss the aiding and abetting claims but until she does, the individual defendants are entitled to seek discovery to defend themselves and the SEC has to look. They have to search for and produce the requested documents so that we can at least have a full and fair opportunity to build a defense for the SEC's recklessness and conscious avoidance arguments.

We also have reason to believe, your Honor -- and I am

not going to belabor it, Mr. Kellogg gave you some examples of discovery that we have gotten, this is not some fishing expedition, we have concrete examples of interactions between sophisticated market players as late as May '19 where the SEC has engaged in dialogue with those market players and the actions they took after that dialogue establishes that they believed, walking away from the meetings with the SEC, that XRP was not a security. That's exculpatory. And we know the SEC has provided private guidance to other market participants leading them to understand that XRP was not a security and that guidance is directly relevant to how the market viewed XRP. That's the argument under *Howey* but it is also relevant to whether it was reckless or intentional to our client to make a determination themselves where the SEC itself may not have made a determination or in fact may have believed, up until very recently, that XRP was not a security, perhaps was more like Ether, more like Bitcoin. We are entitled to explore that and we cited, your Honor, the *Kovzan* case. It is a short case, your has probably already read it. It is really on all fours with what is happening here and if you read the underlying papers for the *Kovzan* case, the SEC filings, the same arguments are being made by the SEC there. This was the case, your Honor, where the CFO of a public company was charged with several scienter-based claims based on his involvement in a perks scheme. He was alleged to have omitted information on

proxy statements of perks -- payments -- going to the CEO. So it was an omissions case and the Court there stated that the recklessness component of scienter had an objective component and that the individual defendant was therefore "entitled to seek evidence from the SEC related to the industry standard in relation to what the SEC itself considered to be unlawful conduct in this area of executive compensation." And the Court was very clear that the SEC must produce relevant documents including those reflecting communications between the SEC and third-parties because they could reflect -- and again I'm quoting from a case -- confusion regarding the regulations. And again, the SEC made the same arguments in *Kovzan* that it attempts to make here. It said there, look, our internal communications are irrelevant to scienter because the defendant didn't know about them, but the Court said wait a minute, there is an objective standard of recklessness so Kovzan is entitled to this evidence whether or not -- and this is a quote -- "such evidence was previously known to him or the public."

Now, Mr. Bliss may say, look, *Kovzan* involved an SEC regulation. Here we are talking about the *Howey* test. But, the Court didn't make that qualification and frankly, your Honor, it is irrelevant in the context of a scienter-based aiding and abetting claim against the individuals. In both cases industry practice and SEC guidance are relevant to the objective components of the individual defendants'

recklessness. In fact, here I think we have a stronger claim than Mr. Kovzan did because what the SEC is effectively saying is that Mr. Mr. Garlinghouse and Mr. Larsen didn't correctly predict that the law would be, in the future, such that XRP would be deemed, in 2020, to be a security by the SEC.

And we would say the *Sentinel* case also, your Honor, as another case where the Court allowed exactly the kind of discovery that we are seeking here. So our entitlement, the individual defendants' entitlement through this discovery isn't just *Howey*, what Mr. Kellogg argued, that's an independent basis when you ought to get discovery, but there is another basis which is the decision to charge this with reckless conduct and that's their theory of the case. They chose to charge individuals, they chose to do it with scienter-based conduct despite an obvious lack of clarity. They're telling Judge Torres it is a simple case involving a rogue application of *Howey* but, your Honor, I don't think anybody perhaps beyond the SEC litigation team believes this is a separate case. And, again, we have seen evidence already of this in the discovery that's been produced so far.

Again, the SEC has asked us to produce various documents and they've attached to their letter two examples of communications from Ripple or its investors that it cites as evidence that XRP's status as a security should have been obvious to the defendants. Well, what we are seeking, your

Honor, is the inverse of that and we are entitled to it because we believe that the SEC's statements about XRP, Bitcoin, and Ether, especially those made to market participants, is evidence that shows it was much more questionable whether XRP would ever be classified as a security than the SEC tells this Court today.

Now, just a couple of final points and I think Mr. Gertzman will want to make a couple of remarks on behalf of Mr. Larsen. I want to address the pandora's box argument, Mr. Bliss alludes to it but I just want to take it on now because really it goes to how unusual these circumstances are. This is not the garden variety Section 5 case. We are not dealing with stocks or bonds or orange groves or whiskey drams or the kind of cases that Courts and markets have considered and evaluated for 75 years. And XRP -- Ripple -- is not like -- again, I'm not talking merits here I am just giving context what the SEC has brought -- it is not like micro cap initial coin offerings or ICOs that look just like IPOs. That's Kik and Telegram. And they brought enforcement actions against those entities. Fine. But, Mr. Garlinghouse was out there encouraging the SEC to pursue fraud actions in this space because that kind of conduct threatens to taint the entire industry and if this case proceeds there will be evidence of that. And Mr. Garlinghouse was talking to regulators, talking to the public, and talking, indeed, to the SEC itself. He

never believed he was doing anything wrong and he wasn't.

So, we are not making a claim of selective enforcement here. You may hear that as well. *The SEC chose not to sue someone else for committing fraud so they can't sue us.* All we are saying is that the SEC is likely to have communications that reflect on whether believing that XRP was not a security -- as my client did, as Mr. Larsen did -- was reasonable or at least not reckless. And the SEC knows these communications are relevant, it is seeking the same kind of communications from us, it is offering up additional discovery, your Honor, because I believe it realizes that we are entitled to these documents but I have a lot of respect for Mr. Bliss and I trust him but, frankly, I don't want him picking or anybody in the SEC, picking our custodians. I think that the custodians we offered up is a reasonable number, the right people, particularly the commissioners themselves, so we would just ask again that that discovery be permitted and that the SEC not be permitted to pick and choose what it provides to us. We are not permitted to pick and choose what we provide to them.

On Kik and Telegram finally, your Honor, I just want to be very clear about this. Again, put the merits aside, this isn't about the merits but they've offered up discovery on Kik and Telegram but not an Bitcoin and Ether. I want to be perfectly clear about this: This case is nothing like those

cases as you pointed out very early on, your Honor. This is a huge step beyond what the SEC took on there. Kik and Telegram involved initial coin offerings, ICOs. This doesn't. The SEC sought preliminary injunctive relief in those cases to stop what it believed was an ongoing unregistered offering scheme. It didn't do it here. Grams were new, according to Judge Castel. XRP isn't new at all. There was no Telegram blockchain at the time of the offering. Not true here. And the companies in Kik and Telegram -- and this is critical -- were in privity of contract with the initial purchasers. Ripple was not. Digital assets in Kik and Telegram had no utility. XRP's technology has been used already to make faster cheaper and more efficient payments. But here is the kicker, and Judge, this is back to where you started with your questions: The SEC didn't charge individuals in those cases, nor in the case that they cited, this *Marine Bank* case. No individuals. The issue in Kik was whether defendants could seek discovery into internal SEC documents in support of its defense that *Howey* was unconstitutionally vague and Judge Castel said -- and the Court there said that is an issue of law, not of fact. Here, as Mr. Kellogg said with respect to *Howey*, these documents speak directly to the fact-intensive inquiry, specifically the character that XRP was given in commerce. You heard Mr. Bliss concede that there is an objective inquiry to be made here under *Howey* and there is

plainly an objective inquiry to be made if you are charging individuals with recklessness. And here, your Honor also, the defendants have raised a fair notice defense, not vague to avoid this defense.

So, I just want to be very clear that the ruling in *Kik* on this issue has no bearing on the relevance of the requested discovery to defend against the SEC's allegations about the individual defendants' scienter. And, again, these are just some of the differences with *Kik* and *Telegram*. There are many others.

So just to conclude, your Honor, if the expert agency couldn't resolve the question apparently for years on what XRP was, was it a security? Is it more like Bitcoin and Ether? Or is it more like one of these ICOs that they waited for years to sort of figure that out, how could it possibly be reckless or intentional for Mr. Garlinghouse or Mr. Larsen to determine XRP was not a security? It can't be. And that's why this discovery, independently of everything Mr. Kellogg said about the *Howey* test -- those arguments apply to individuals too -- but on this independent basis we need this discovery to defend ourselves. If the SEC is prepared to say they're not pursuing reckless they're not pursuing conscious avoidance maybe we would be in a different place on this argument but I don't think they're prepared to say that.

So, for all of those reasons, your Honor, we believe

we are entitled to this discovery and we hope the Court orders the discovery forthwith so we can make effective use of it to defend ourselves in this litigation.

Thank you.

THE COURT: Thank you.

Mr. Gertzman, there has been a lot of oxygen spent on these arguments but if you feel like you have something particular that is unique as to Mr. Larsen, there is something that hasn't been raised that is important I will give you the opportunity to be heard.

MR. GERTZMAN: Thank you, your Honor, and I appreciate that and I will be very brief and not repeat or try not to repeat anything that Mr. Kellogg or Mr. Solomon said, although I agree and support their points completely.

Just a couple of brief things. First, Mr. Bliss said in response to one of your questions early on that there is nothing about the inclusion of the individual defendants in this case that makes documents about Bitcoin and Ether irrelevant in this case. I don't agree with that, I think it is incorrect, I think it is incorrect for the reason that your Honor already pointed out which is it essentially asks this Court, on an unsupported, naked assertion by the SEC on a motion to compel, to throw out an entire issue of whether Bitcoin and Ether are similar and how similar they are to XRP. But the point I want to make is the point about recklessness in

this context because the issue of how different or similar XRP is to Bitcoin and Ether also goes to the issue of recklessness in the minds of the individual defendants. And no one is saying, your Honor, that these three assets are exactly the same. How similar they are and how different they is a critical factor when it comes to the way the defendants are thinking about this and that's why this discovery is relevant on the issue of recklessness.

I also want to just drill down a little bit on the definition of recklessness because I think it helps explain and show why the discovery we seek here is so critical and relevant. This is a term -- recklessness is a term that has been defined, well-defined by the Courts at this point and the cases that we cite in our papers including the definition but the point is that there is an element of recklessness that is objective. There is an element that requires the SEC to prove here that it was so obvious, it would have been so obvious to Mr. Larsen and Mr. Garlinghouse that XRP was a security that they were reckless; that they departed so far from ordinary standards of care on that question that they were reckless. And the way to think about how to prove or disprove an issue of recklessness is to look at what's being said and thought about and done in the marketplace on that issue. And to use a term Mr. Kellogg used, he described the SEC as a focal point. I think that's a fair characterization, that the SEC has a focal

point on the issue of whether XRP was a security because it sat at the center of lots of communications and discussions and internal review and assessment of that issue. And so, it is the logical place to turn to for that evidence because if, in the end, the evidence from the SEC shows that they were unsure about whether XRP was a security or that they concluded at times that it wasn't, then how in the world can Mr. Larsen and Mr. Garlinghouse be accused of being reckless on that issue?

I also want to make a quick point, your Honor, about specific allegations in the amended complaint, specifically paragraphs 55 and 59 of the amended complaint in which the SEC alleges that Mr. Larsen received legal advice in 2012 that he should go to the SEC to seek clarity as to whether XRP was a security. I am mindful of your Honor's reminder that one of the documents at issue here is under seal so I won't go into the substance of the document but there will be a lot to be said about that document as we go forward because I think the SEC's allegations in the complaint about that advice really distort and omit critical compliance and conclusions of that advice.

The point I want to make on this motion to compel, your Honor, is that it is really not appropriate and fair for the SEC in the complaint to take Mr. Larsen to task for not going to the SEC to ask about whether XRP was a security and then to tell us, as they are in this motion, sorry, we are not

going to tell you what we would have told Mr. Larsen about whether XRP was a security. We are not going to tell you what we were thinking and doing and talking about with others on that issue. We are just going to criticize you for not going to us in the first place. That's not appropriate, your Honor. They have put in issue the very question of what they were saying and doing and thinking and talking about when it came to whether XRP was a security.

The last point I want to make, your Honor, is that it is really more of a general point that I think it's pretty obvious that the issues in this case are really important; they're obviously important to the parties, they are important to my client and Mr. Garlinghouse who have been accused of reckless and knowing conduct which is obviously a very serious allegation. I think it is fair to say that important segments of the fintech and cryptocurrency community are watching this case closely and, ultimately, it is going to be up to the Court. And by Court I mean this Court, your Honor, and Judge Torres, and potentially the Court of Appeals and maybe even the United States Supreme Court if it comes to that, it is going to be up to the Court to decide whether XRP is or was a security or not. And I just think, given the importance of those issues and how new an issue this is, how critical it is in the context of trying to apply this 1933 definition of security and the 1946 Supreme Court *Howey* definition to the current situation it

is important that this evidence within the SEC about its communications with others and its discussions about those communications, that that not be kept from the Court, it not be kept out from the record. The Court can always decide whether that evidence should be admissible at trial and what weight it should be given. But, for that evidence to be ruled out of discovery in the first place I think is really a distortion in the face of Rule 26 so we would ask the Court to grant the motion to compel.

I am happy to answer any questions you may have.

THE COURT: Great. Thank you.

Mr. Bliss, if you want to take five minutes to respond to anything in particular I am happy to give that to you.

MR. BLISS: Yes. Thank you, your Honor. I appreciate that, because in listening to various different counsel's statements it is really remarkable to hear that what really underlies a lot of their request is this claim that action or inaction by the SEC has somehow led the markets to believe something about XRP as far as its status as a security.

Since 1946 there has never been a case saying that some action or inaction by the SEC influences how the market views an instrument. They don't cite one. It doesn't exist. The actions of the promoter are what needs to be the focus here. And so, to try to put the SEC on trial is totally inappropriate based on decades of law. And it is clear, in

listening to the various defense counsel assert that they think that the discovery would somehow show that the SEC was flailing or was confused is, again, remarkable. The SEC acts pursuant to its statutory authority. It investigates. It issues enforcement actions. It issues no action letters. That's how it operates. And so, the idea that because it took X number of years from the time XRP existed to get an enforcement action somehow opens the kimono to total and complete discovery inside the SEC is really a remarkable position for the Defense to be advocating and it is not supported. And specifically, on the point that was suggested by Mr. Solomon that the SEC individuals are somehow giving comfort to market participants in SEC meetings that XRP is not a security, again, that is not how the SEC operates. In this case the SEC took time, completed an investigation, filed an enforcement action. And so, allowing discovery into the SEC's internal and deliberative communications would have a chilling effect on every federal agency. If agency employees' communications were subject to discovery, every time an agency filed an enforcement action in which the defendant challenged the clarity of the law or the defendant's understanding of it or the timing of the action, it would derail federal agency litigation from being focused on the conduct of the defendants to being about the conduct of the government and its officials. It would also open the door to discovery far beyond the issues in the filed regulatory

actions. Here it would involve the complicating factor of opening the door to discovery from Ripple's own counsel who were the chair of the SEC and the head of the Division of Enforcement for several years of the relevant period in this case when defense counsel now apparently claims that the SEC gave the market some impression of XRP during the time that it took to file the action. And the improper breadth of the discovery, it was further demonstrated today in terms of the discussion of Mr. Clayton and a subpoena that was sent last week to the former SEC's Chair's new place of employment for documents and communications from while he was the Chair about XRP and other digital assets.

So, there is just no basis to allow defendants to put the SEC and its commissioners and its staff on trial for operating in the way that it does.

And, specifically on the point of the *Kovzan* case, Mr. Solomon correctly identified that that case and any of the few cases they cited that grant some type of SEC internal discovery are about situations in which the SEC has promulgated rules and interpretation of those rules. Every one of the cases that they cite that's the case. And this is not the case here. The *Howey* test is for federal court interpretation and has been out there since 1946, it is not about an SEC rule that has been implemented.

And, I also think it is important to go back to the

speech by Mr. Hinman that has been referenced several times now. This was not an official position of the SEC commissioner itself but it is important that in 2018 Mr. Hinman gave a speech not about XRP but about digital assets generally. He said -- to quote that speech which is publicly available on the SEC's website -- "The digital asset itself is simply code but the way it is sold as part of an investment to non-users by promoters to develop the enterprise can be, and in that context, most often is a security because it evidences an investment contract." He contrasted that to Bitcoin: "When I look at Bitcoin today, I do not see a central third-party whose efforts are a key to determining the factor in the enterprise." But here Ripple is doing exactly what Mr. Hinman said makes a digital asset a security: Acting as a central party promoting XRP as an investment. And notably, as of June 2018 when Mr. Hinman made that speech, there was no use for XRP other than investment. As we alleged in the complaint, paragraphs 362 to 364, it wasn't until October 2018 that Ripple commercially launched any use for XRP. And, even since then, that use has been minimal accounting for no more than 1.6 percent of XRP's trading volume during any given quarter. So, at the time of Mr. Hinman's speech, Ripple had been conducting an ongoing offering for five years during which time XRP was offered and sold as an investment with no current use at all. And, to the extent the defendants now wish to feign confusion

about the time at which Mr. Hinman made those remarks in 2018, Ripple was under investigation by the SEC at the time of that speech. That speech could not have provided any comfort or confusion to the defendants about the status of XRP at that time.

With that, I am happy to answer any questions.

THE COURT: Just a quick clarifying question. You distinguish the speech, Mr. Hinman's speech suggesting it was not a pronouncement but rather just a speech that referenced Bitcoin and so is it -- does the SEC take a position that as of a certain date its position was official as to Bitcoin and Ether?

MR. BLISS: So I want to make clear that this is my understanding of the current situation and I don't want to be overly technical but the SEC, itself, my understanding, it has not taken an official position. There is no action that it took to say Bitcoin is not a security, Ether is not a security. Now, there was a speech by a high-ranking person who said that to him that's what it looked like but there has been no action letter, no enforcement action, none of the official ways in which the SEC takes a position on that matter that has occurred. What I understand defendants to be referencing is the speech by Mr. Hinman which is not an official statement of the Securities and Exchange Commission itself.

THE COURT: Okay. Thank you. I appreciate that

clarity.

Okay. Thank you everybody for your arguments. I appreciate them. As I have come to expect from this group of lawyers, they were excellent and the papers that you submitted as well were excellent. And I recognize that this is high-stakes litigation and that people are quite invested in the outcome of the issues including the individual defendants who face serious individual liability.

I have reviewed the letters and have listened carefully to the argument. I am going to grant, in large part, the defendant's motion. I think that the discovery related to Bitcoin and Ether is relevant. I think it is relevant to the Court's eventual analysis with respect to the *Howey* factors, but I also think it is relevant as to the objective review of defendants' understanding in thinking about the aiding and abetting charge or aiding and abetting count. I also think it is relevant to the fair notice defense that Ripple is raising. So, for all of those reasons, I think discovery into Bitcoin and Ether is appropriate and I am going to authorize it. I am going to authorize discovery both as to exclusively Bitcoin or Ether communications as well as XRP communications between the SEC and third-parties, and by that I am excluding all market participants and the other government agencies. I am not including SEC-to-SEC internal communications in that ruling. And so, the SEC is obligated to review the discovery request.

I am just looking at the actual requests themselves. I know we have been talking about requests 4, 7, 8, 11, and 14. Search all of the relevant repositories for documents and discovery related to communications to third-parties. In addition, I am ordering that discovery be conducted of all 19 custodians. I don't think that the SEC's arguments, as set forth within their letters and again today, are a legitimate basis given the relevancy standard to preclude discovery here. 19 custodians for an incredibly high-stakes, high-value litigation is not unreasonable, and given the three different categories of grounds not to produce documents, I don't think that that is a legitimate basis so I am going to direct that the SEC search all 19 custodians for relevant and responsive documents.

I am going to deny in part the request for discovery that is internal, and specifically internal, for instance e-mail communications between what I will call the SEC staff to SEC staff. I think that that communication both is less relevant as it goes to how the outside world -- how the market is considering XRP and how the individual defendants, how it affects their reasonable belief, and I also think that there are likely to be extensive privilege issues there and I think it has the potential to seriously chill government deliberations and so I am not going to require communications to be produced that are internal e-mail communications within the agency. If you want the parties to meet and confer -- and

this will betray some of my ignorance as to how the SEC may operate -- to the extent there are relevant minutes or more official internal memos on these areas of discovery that I am authorizing, both the Bitcoin and Ether discovery as well as the XRP discovery, I want the parties to meet and confer on whether those should be produced. So, my limitation now is just as to e-mail communications, the sort of everyday, more informal communications that I think would not be appropriate for discovery here. But, to the extent internally there are memos being sent up to higher-ranking officials expressing the agency's interpretation or views on these matters, those types of documents may be discoverable but I will direct that the parties meet and confer with respect to that. Obviously to the extent in producing these documents there are documents that are privileged, the SEC certainly has the right and obligation to identify privileged documents and produce the privilege log and the parties are ordered to meet and confer on that privilege assertion and if you can't reach a resolution you can obviously bring that dispute to me.

All right. That is my ruling on the motion. Anything further from the SEC?

MR. BLISS: No, your Honor. Thank you.

THE COURT: Anything further from the defendants?

MR. KELLOGG: Nothing from Ripple left, your Honor. Thank you.

MR. SOLOMON: Nothing from Mr. Garlinghouse. Thank you.

MR. GERTZMAN: Nothing from Mr. Larsen right now. Thank you, your Honor.

THE COURT: All right everybody. Stay safe. Thank you very much.

We are adjourned.

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